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No. 772

# In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH T. MARZEC, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 3 |
| Argument | 8 |
| Conclusion | 14 |


## CITATIONS


Cases:

| | |
|---|---|
| *Berra* v. *United States*, 351 U. S. 131 | 13 |
| *King* v. *United States*, 203 F. 2d 525 | 10 |
| *Whiskey Cases*, 99 U. S. 594 | 8, 9, 10 |

Statute:

| | |
|---|---|
| Internal Revenue Code of 1939, Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b)) | 2, 3 |
| Internal Revenue Code of 1939, Sec. 3616 (a) (26 U. S. C. 1952 ed., Sec. 3616 (a)) | 13 |

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### OPINION BELOW

The opinion of the Court of Appeals (Pet. 33–38) is reported at 249 F. 2d 941.

### JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1957 (Pet. 33), and, by order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended to February 10, 1958. The petition was filed on February 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether petitioner, having provided the Government with certain information regarding attempted evasion of income taxes by himself and others, thereby acquired an "equitable right to immunity" which precluded his being tried for attempted evasion of his own taxes.

2. Whether the trial court abused its discretion in denying a continuance on defense counsel's representation that he was not prepared for trial and wanted to apply for executive clemency, when it appeared that fourteen months had elapsed since the indictment was returned and several continuances had already been granted.

3. Whether petitioner was deprived of due process of law by various alleged trial errors.

## STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

**STATEMENT**

On December 15, 1955, there was filed in the United States District Court for the Northern District of Illinois an eight count indictment against petitioner, Frank Brandt, Bruno Sobieraj and Stanley Kusper. In separate counts, each defendant was charged with having willfully attempted to evade and defeat his individual income taxes for the years 1949 and 1950, in violation of Section 145 (b) of the Internal Revenue Code of 1939, by failing to report stated amounts of income received from a joint venture conducted by the four defendants. (AA. 5–7.)[1] Petitioner entered a plea of not guilty and moved for a severance, which was denied on January 23, 1956. (AA. 13, 89.) The case was originally set for trial in February, 1956, but was continued from time to time. On December 5, 1956, it was set down for trial on February 4, 1957. (AA. 85; GA. 112.) The latter date was agreed upon because petitioner's counsel, Joseph R. Struett, was to depart for a world cruise in March, 1957. (AA. 89; GA. 106, 110; Pet. 38.) On January 18, 1957,

[1] The record certified to this Court consists of (1) the one-volume Appellant's Appendix filed in the Court of Appeals, designated herein as "AA."; (2) the one-volume Government's Appendix filed in the Court of Appeals, designated herein as "GA."; and (3) the 33-page transcript of proceedings on February 21, 1957, when sentences were imposed, not cited herein.

Sobieraj withdrew his plea of not guilty and entered a plea of guilty, offering to testify for the Government. (AA. 15–17.) On the same day, the United States Attorney moved for a severance, stating that Struett had represented at various times that petitioner would be available to testify on behalf of the Government; that, four days earlier, however, Struett had advised that petitioner would not testify so long as he remained joined with the other defendants; and that the Government was of the opinion that petitioner, if available as a witness against Brandt and Kusper, could present valuable and direct evidence against them and thus materially shorten their trial. (AA. 15–16; GA. 115.) The Government's motion for severance was prompted by the new situation brought about by Sobieraj's plea of guilty and his offer of cooperation with the Government. (AA. 20–21.) It was granted on January 23, 1957, after Struett stated that he had no objection to it. (AA. 23.) Petitioner's case was set for trial first, to be followed immediately by those of Brandt and Kusper "in alphabetical order". (AA. 27.) Brandt then entered a plea of guilty. (GA. 93.) Struett moved for a continuance on the grounds that he was not prepared for trial and that he desired time to apply for "executive clemency" for petitioner. The motion was denied. (GA. 93–94, 119, 121).

On February 18, 1957, after a jury trial, petitioner was found guilty on the two counts in which he was charged, and on February 21, 1957, he was sentenced to concurrent prison terms of three years on each count. (AA. 279, 306.) On their respective pleas of

guilty, Sobieraj received a one-year suspended sentence and was placed on probation for two years, and Brandt received a one-year prison sentence. (AA. 301, 302.) The indictment against Kusper was dismissed, on the Government's motion, for lack of evidence. (AA. 297, 298; GA. 303, 306–308.)

The evidence to support the verdict against petitioner may be summarized briefly as follows:

During the prosecution years, petitioner was employed by the Polish Roman Catholic Union, a fraternal organization owning assets of about $38,000,000, a large part of which was invested in real estate mortgage loans. (AA. 94.) The loans had to be approved by the Treasurer (Brandt), backed up by an indepedent appraiser (Sobieraj). (AA. 99, 113; GA. 208–209). Petitioner, a licensed real estate broker, "brought in" applications for mortgage loans and performed certain duties with respect to them. (AA. 94, 138; GA. 223.) Although it was no part of petitioner's duties to the Union to collect commissions from mortgagors for the approval of their loan applications (AA. 138), he did in fact collect such commissions (AA. 96, 99, 101–108, 120; GA. 272). They were paid to petitioner by six mortgage brokers and real estate brokers negotiating loans on behalf of their clients. (AA. 96, 100, 103, 107, 119, 120; GA. 463–464.) These commissions usually ranged between 3% and 5% of the face amount of the mortgages, but in some instances petitioner exacted as much as 6%. (AA. 97–98, 100, 104, 107–108, 119; GA. 385, 422.) In a few cases, the commissions were paid by check to petitioner's order (AA. 95, 110;

GA. 169), but the great majority were paid to him in cash or by cashier's checks, as petitioner had requested (AA. 98, 101, 104, 119, 120; GA. 335–336).

Petitioner did not retain all of the commissions for himself but was obliged to share them with the Union's Treasurer, Brandt, with the outside appraiser, Sobieraj, and, to a lesser extent, with the attorney who did legal work for the Union, Kusper. (GA. 463–464). When petitioner was paid by check, he paid Sobieraj and Kusper their shares by check drawn on his own (petitioner's) bank account. (GA. 336–337.) When petitioner received cash, he paid Sobieraj in cash. (GA. 341.) Brandt would never accept checks and always insisted that petitioner pay him in cash. (GA. 336, 338.) Sobieraj's share ranged between one-half of one percent and one percent of the amount of the loan, and Brandt's share was one percent. (GA. 208–209, 233–234, 340.) Sobieraj and Kusper kept records of all the commissions they received; Brandt and petitioner did not. (GA. 209–212, 302, 303, 384–386, 503–511.) Petitioner did, however, record on his books and report on his income tax returns the commissions he received in the form of checks, claiming as deductions the checks he paid out to the other defendants. (GA. 252, 256, 335–336, 390, 400, 458, 460.) Petitioner's net income from commissions as reported on his income tax returns and as shown by the evidence at the trial was as follows (GA. 458, 460, 463–469):

| Year | Reported | Corrected | Unreported |
|---|---|---|---|
| 1949 | $8,004.53 | $35,879.20 | $27,874.67 |
| 1950 | 23,482.05 | 45,153.05 | 21,671.00 |

The understatement of income on petitioner's returns resulted in tax deficiencies of $9,326.58 in 1949 and $9,403.17 in 1950, compared with tax liabilities reported by petitioner for those years of $1,397.64 and $5,077.72. (AA. 183–184; GA. 457, 459, 467, 470.)

To show willfulness, the Government presented evidence that petitioner reported only those commissions he received in check form (never those received in currency or by cashier's checks), as well as evidence concerning petitioner's conduct during the investigation. Investigation began late in 1950, when Revenue Agent Osheroff discovered, in the course of examining the tax returns of one Henry Banach, that some $30,000 was shown on Banach's books as having been paid to petitioner in 1949. (AA. 146–147; GA. 247–248, 260.) In April, 1951, petitioner stated to the Treasury agents under oath that he had not received any commissions from Banach, and he made the same representation to his own accountant. (GA. 183–186, 254–255, 258.) These denials were false, as petitioner admitted at the trial. (GA. 382–383, 391–392.) Petitioner had, as a matter of fact, received from Banach more commissions, in both 1949 and 1950, than he had received from any of the other five brokers with whom he did business. (GA. 463–464.)

In June, 1951, petitioner filed an amended individual income tax return for 1950 in which he reported additional income of $39,820, the exact amount Banach had reported to the Government (on an information return) as having been paid by him to petitioner for commissions in 1950. (GA. 186, 188, 190, 461–462.) In September, 1951, petitioner at-

tended another conference with the agents, accompanied by his accountant, and, when asked whether he had received any unreported commissions, replied that he had nothing to say. (GA. 259, 276–277.) It was not until three years later, when his prosecution was imminent, that petitioner advised a representative of the Government that he had received unreported commissions. Thus, in November, 1954, he appeared in the United States Attorney's office and offered to cooperate with the Government by disclosing the truth about the commissions. (GA. 279–280, 392.) Later petitioner was permitted to appear before the grand jury, at the request of his attorney, but was warned that he did not have to testify and that he might very well be indicted. (GA. 410–411.)

During the course of his summation to the jury, defense counsel made the following statement (Pet 33, GA. 430):

> There isn't any question in this case and never has been that Mr. Marzec is guilty in the sense that he failed to report his income in the years in question in the amounts he should have at the time he should have.
>
> I couldn't argue conscientiously to you people otherwise. He has told the Government that and he has admitted it to me and I am not going to deceive you.

## ARGUMENT

1. Petitioner contends (Pet. 8–12, 26–27) that he acquired an "equitable right to immunity from prosecution" by furnishing the Government evidence against the three other defendants. His sole reliance is upon the *Whiskey Cases*, 99 U. S. 594. It was

there held that a district attorney has no authority to contract that a defendant shall receive immunity in return for disclosures against his accomplices; that, therefore, no contract of immunity can be pleaded in bar of proceedings against such defendant; that the defendant has no more than "an equitable title to the mercy of the executive" (99 U. S. at 596); and that this claim to consideration can come before the court only by way of a motion for continuance to give the defendant time to make application to the executive. In the instant case, the record shows affirmatively that, although defense counsel did attempt, from time to time, to enter into an agreement with the Government, none was ever made. (GA. 81–82, 117.) Neither the United States Attorney nor the Internal Revenue Service made any promise whatever to petitioner, save for an offer that if he would plead guilty to one count the Government would move to dismiss the other. (AA. 82–83.) On the contrary, representatives of the Government repeatedly took pains to inform petitioner and his counsel that the Government was not interested in obtaining any evidence from petitioner unless it was plainly understood that he was being offered no immunity and no other consideration except that which the court might see fit to give him. (GA. 114, 425; AA. 21, 82; Pet. 34–35.)[2] Thus, the decision in the *Whiskey Cases*, even assuming that

[2] Petitioner's "cooperation" with the Government, which began four years after the investigation got under way (*supra*, pp. 7, 8), was doubtless impelled by the belief that it would serve his own interests. By the end of 1954, when the "cooperation" began, the United States Attorney was about to seek petitioner's indictment, charging him with the receipt of

it has any continuing vitality,' does not apply here. Whatever the equities may be when an offer of evidence is induced by the prosecution's promises, this is a case in which there was a scrupulous refusal to extend any *quid pro quo* whatever.

2. Petitioner urges (Pet. 12–15, 27–29) that he was deprived of the assistance of counsel because his attorney was not prepared for trial. The record shows that the indictment was returned in December, 1955; that the case was first set for trial in February, 1956, but was thereafter continued from time to time; that, near the end of 1956, it was set for February 4, 1957, a date agreed upon between the parties because defense counsel planned to take an extended vacation beginning in March, 1957; and that, when the trial date arrived, defense counsel announced that he was not prepared for trial. (*Supra*. pp. 3–4.) Petitioner professes to have been surprised by the entry of a plea of guilty by Sobieraj on January 18, 1957, and the granting of the Government's motion for sev-

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income to the extent of the gross commissions collected by him. (Pet. 9; *supra*, pp. 8.) At that time, the other defendants denied having shared in the commissions, and petitioner had never alleged that they had so shared; hence the evidence of guilt pointed to petitioner alone. (Pet. 9; *supra*, pp. 7–8.) By disclosing his distributions to the others, petitioner reduced the amount of income chargeable to him.

[3] The court below was of the view that enactment of the Federal Probation Act laid to rest any lingering notion that a court should stay its hand so that an offender who has turned "state's evidence" may first seek an executive dispensation. See discussion in *King* v. *United States*, 203 F. 2d 525 (C. A. 8). It was also of the view that, in any event, the facts of the instant case do not bring it within the doctrine of the *Whiskey Cases*.

erance five days later (Pet. 13, fn. 9), but petitioner had been put on notice three months earlier by the United States Attorney's office that in the event of a severance it would be necessary to try petitioner first (GA. 103; *supra*, pp. 3–4). If counsel was unprepared for trial after the lapse of some fourteen months from date of return of the indictment, he had only himself to blame. The Government did nothing to lead him to believe that it was unnecessary for him to prepare for trial. (GA. 116.) The granting of a motion for continuance is a matter within the trial court's discretion, and certainly there was no abuse of discretion in the circumstances presented here. Moreover, petitioner's guilt is so plainly established (*supra*, pp. 5–8) that it is difficult to believe that any amount of preparation could have changed the result. Petitioner ventures no specific suggestion as to how the denial of his motion may have been prejudicial.[4]

3. Petitioner contends further (Pet. 15–25, 29–30) (a) that the trial court erred in excluding Defendant's Exhibits 45 and 46; (b) that the Government knowingly introduced false testimony by Sobieraj and by Special Agent Worcester; (c) that the Government improperly stifled the prosecution of Kusper; (d) that the jury instructions were inadequate; and (e) that petitioner's 3-year prison sentence was too severe.

*a.* Defendant's Exhibits 45 and 46 have not been

[4] When defense counsel complained that he was not feeling well at the conclusion of the Government's evidence, the court continued the case from Thursday, February 7, 1957, to Monday, February 11, 1957. (Pet. 38; AA. 185–186.)

printed or certified to this Court.[5] At all events, it is difficult to understand how petitioner can claim prejudicial error resulted from their exclusion when he himself states (Pet. 15):

> From this evidence, as the court below was advised, the Government could have readily and easily established the charges of its indictment against Marzec.

*b.* The charge (Pet. 17–18) that Sobieraj and Worcester testified falsely, and that the Government knew it, has no foundation in the record, as the Court of Appeals pointedly stated (Pet. 37). Sobieraj admittedly did not report on his tax returns all of the commissions he received from petitioner, but he did keep a record of them. Petitioner kept records only as to those few items reported on his income tax returns, *i. e.*, those paid to him by check. (GA. 213; *supra*, p. 6.) If Sobieraj's records were inaccurate in minor respects, those inaccuracies were brought out at the trial and hence were before the jury. Certainly, such inaccuracies as there may have been were not of a kind to have any impact on the verdict.

Treasury Agent Worcester's testimony merely summarized the Government's proof. (GA. 298.) Worcester gave petitioner credit for commissions he had paid to Sobieraj and Kusper, based on the detailed records maintained by Sobieraj and Kusper.

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[5] According to the Government's brief in the Court of Appeals (p. 39), these exhibits were excluded because they were not original records, nor were they based upon records from which their accuracy could be inferred.

(GA. 302–303, 306–308.) Because Brandt kept no records, Worcester gave petitioner full credit for having paid Brandt the commissions petitioner claimed to have paid him. (GA. 302.)

*c.* The two counts of the indictment charging Kusper with attempted evasion of his income taxes were dismissed on the Government's motion because it was concluded that there was a lack of sufficient evidence to prove them. (*Supra,* p. 5). The soundness of this conclusion has no bearing on the merits of petioner's case.

*d.* Petitioner now complains that the instructions to the jury were not "adequate * * * on behalf of Marzec" (Pet. 22). However, with one immaterial exception,[6] petitioner requested no additional instructions at the trial (AA. 251–255), and he agreed that the charge as a whole was fair. (Pet. 37.)

*e.* The concurrent sentences imposed upon petitioner were well within legal limits and raise no appellate question.

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[6] Petitioner requested that the court instruct the jury that it might find him guilty of the "lesser included offense" described in Section 3616 (a) of the Internal Revenue Code, 1939. Under *Berra* v. *United States*, 351 U. S. 131, the refusal of this request was, of course, proper.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1958.